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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/064,840	08/22/2002	Kim D. Lavine	GRE45 P-300	3121

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EXAMINER

PEFFLEY, MICHAEL F

ART UNIT	PAPER NUMBER
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3739

DATE MAILED: 02/18/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/064,840

Applicant(s)

LAVINE, KIM D.

Examiner

Michael Peffley

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 22 August 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-32 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-32 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)  
Paper No(s)/Mail Date 2.3.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_.

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It is noted that applicant's invention has been on sale as indicated at page 5 of the specification. Applicant is respectfully requested to provide information regarding the sale history of the product, specifically when the product was first marketed for public sale. It is further noted that applicant contends that a distinguishing feature of the invention is the use of seeds, grains and/or fruit pits as a heat conductor. As indicated below in the prior art rejections, the use of such as a heat/cold medium is well known in the art, and the examiner has discovered a variety of other companies via a routine internet web engine search (i.e. using "Google") which market similar heat/cold therapy systems that include a variety of shapes, removable covers and organic fillers such as flaxseed and buckwheat.

***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2, 6, 11, 12, 16, 21-23, 27 and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bastille ('155) in view of the teaching of Brink et al ('962).

Bastille discloses a thermo-pad which includes an enclosed member having a plurality of pieces of organic material therein. Bastille specifically uses cereal grains (i.e. oats and wheat) as the filler (see Abstract). Further, Bastille teaches that a removable, washable outer covering may be provided over the enclosed member (col.

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4, lines 20-23), but does not expressly state that the outer cover has a slit for the insertion and removal of the enclosed member.

The examiner maintains that a removable outer cover would inherently require some type of slit or opening to allow for the removal of the thermo-pad. Also, it is generally known in the art to provide such heat/cold packs with removable covers such that the thermo-pad may be located within the cover when applied to tissue and removed from the cover so the cover may be cleaned. Brink et al disclose one such type of cover which is used to secure a hot or cold member to a person. The cover may be washed (col. 7, lines 1-3) and may take any desired shape or configuration (col. 6, lines 50+) and includes a slit for the insertion of the hot/cold member (see figures).

To have provided the Bastille device with a removable cover which may be washed and includes a slit for the insertion/removal of the thermo-pad into the cover would have been an obvious design consideration for one of ordinary skill in the art, particularly since Bastille discloses that the use of a removable cover is anticipated and further since Brink et al teach of a known thermo-pad cover which includes a slit for the removal of the thermo-pad to allow for washing of the cover.

Claims 1, 2, 6, 9-12, 16, 19-23, 27 and 30-32 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bastille ('155) in view of the teaching of Stafford et al ('400).

Again, Bastille discloses an enclosed thermo-pad member filled with organic filler material and teach it is advantageous to provide an outer, removable cover. Bastille also disclose multiple shapes for the device for different applications, but fails to

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disclose the specific "head-shaped" cover as set forth in claims 10, 20 and 31, or the presence of a slit for inserting and removing the thermo-pad. Bastille also fail to specifically teach of a decorative cover.

Stafford et al disclose a cover which is used to removably hold thermo-pads for treatment of the head. There is a rectangular portion (i.e. pockets 2A and 2B) which accepts an enclosed member (3) and a soft material (i.e. "Turtle Fleece™ – col. 3, lines 40-42) surrounding the pockets. The thermo-pad is inserted into the cover through a slit in the top of the cover.

With regard to the use of a decorative print on the cover, this is deemed a simple design consideration for one of ordinary skill in the art. There is no functional criticality associated with such a design on the cover, and applicant's specification is void of any particular unexpected result obtained from such a design.

To have provided the Bastille device with a cover having a slit for the introduction of the thermo-pad into the cover would have been an obvious modification for one of ordinary skill in the art. To have further provided the Bastille device with a head shaped cover and associated thermo-pad would have been an obvious consideration in view of the teaching of Stafford, particularly since Bastille discloses a variety of shapes and Stafford teaches of a specific head-shaped applicator for an analogous thermo-pad.

Claims 3, 4, 13, 14, 24 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bastille ('155) and Brink et al ('962) as set forth in the claims above, and further in view of the teaching of Gaudreault et al ('104).

The combination of the Brink et al teaching with the Bastille device has been addressed previously. While Bastille teaches the use of organic grains as the filler for the thermo-pad, there is no specific disclosure of the use of corn or rice as the filler material.

Gaudreault et al disclose an analogous thermo-pad and also teach the use of grains as the filler material. Gaudreault et al also specifically teach that grains such as rice and corn are also known fillers (see col. 5, lines 36-38).

To have used an alternative filler grain, such as rice or corn, as the thermal medium in the Bastille device would have been an obvious design consideration for one of ordinary skill in the art, particularly in view of the teaching of Gaudreault et al.

Claims 5, 15 and 26 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bastille ('155) and Brink et al ('962) as set forth in the claims above, and further in view of the teaching of Segers ('053).

The combination of the Brink et al teaching with the Bastille device has been addressed previously. While Bastille teaches the use of organic grains as the filler for the thermo-pad, there is no specific disclosure of the use of cherry pits as the filler material.

Segers discloses an analogous thermo-pad and specifically teaches the use of cherry pits as the filler material. Segers discloses the particular method of preparing the cherry pits and their insertion into thermal products which may take various shapes (see Abstract, Figures).

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To have used an alternative filler, such as cherry pits, as the thermal medium in the Bastille device would have been an obvious design consideration for one of ordinary skill in the art, particularly in view of the teaching of Segers.

Claims 7, 8, 17, 18, 28 and 29 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bastille ('155) and Brink et al ('962) as set forth in claims 6, 16 and 27 above, and further in view of the teaching of Sparks ('240).

The combination of the Brink et al teaching with the Bastille device has been addressed previously. While Bastille and Brink et al both disclose removable covers used to contain a thermo-pad, there is no specific disclosure of providing a plastic lining on the outer cover. With regard to the specific shape of the cover (i.e. dog-boned shape), the examiner maintains that such a configuration is merely decorative would be an obvious design choice for one of ordinary skill in the art. Applicant's specification is void of any criticality or unexpected result associated with the claimed shape, and it is considered to be a simple design choice.

Sparks disclose a cover for a thermo-pad substantially as shown by Brinks et al. In particular, Sparks specifically teach of the various layers which may be used in such a cover, and in particular indicate the use of a plastic liner (72) which is waterproof and may be wiped clean (col. 3, lines 8-15).

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To have provided the Bastille device, as modified by the teaching of Brinks et al, with a plastic liner for the cover to provide a waterproof layer would have been an obvious consideration for one of ordinary skill in the art in view of the teaching of Sparks.

### ***Conclusion***

The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Schooley ('025) disclose another cover into which a thermo-pad may be removably inserted. O'Sullivan ('590), Jones ('590), Dixon ('194), Cipolla ('628) and Owens ('105) disclose various other thermo-pads which include removable covers.

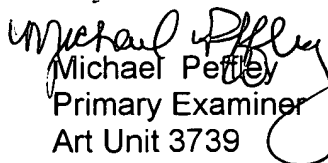
Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael Peffley whose telephone number is (703) 308-4305. The examiner can normally be reached on Mon-Fri from 6am-3pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Linda Dvorak can be reached on (703) 308-0994. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.



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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

  
Michael Petley  
Primary Examiner  
Art Unit 3739

mp  
February 12, 2004